Petition

81-1073

No.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

JAMES J. MOYER - - - - - Petitioner

vs.

ELDER-BEERMAN STORES CORP. - Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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JAMES J. MOYER - - - - - *Petitioner*

v.

ELDER-BEERMAN STORES CORP. - - *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment and order of the United States Court of Appeals for the Sixth Circuit in *James J. Moyer* v. *Elder-Beerman Stores Corp.*, No. 80-3171, entered July 8, 1981, as to which a petition for rehearing en banc was denied on September 10, 1981.

QUESTION PRESENTED FOR REVIEW

When age is a stated, written reason for rejecting an applicant, can an employer avoid liability under the Age Discrimination in Employment Act, 29 U.S.C. §§ 621, *et seq.*, by articulating non-discriminatory justifications not known by the employer at the time of the rejection?

DECISIONS BELOW

Neither the decision of the United States District Court for the Southern District of Ohio nor the opinion of the United States Court of Appeals for the Sixth Circuit is reported, officially or unofficially. Each is reproduced in the Appendix.

GROUNDS FOR JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254. The Sixth Circuit rendered its judgment on July 8, 1981. A timely petition for rehearing was filed, and that petition was denied by the Sixth Circuit in an order dated September 10, 1981.

STATUTE RELIED UPON

Petitioner principally relies upon the provisions of the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 *et seq.* Section 623(a) provides:

> (a) It shall be unlawful for an employer —
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age. . . .

STATEMENT OF THE CASE

A. Procedural Background

This is a civil case brought under the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 *et seq.* (the "ADEA"). James J. Moyer, an applicant

for an executive position at Elder-Beerman Stores Corporation, received in August of 1977 a rejection letter from the president of Elder-Beerman which stated, in part: "My concerns relate to your age and your time out of the business. . . . I am not sure that, at this point in your career, you would be the right candidate for us." Appendix 18a. Within 180 days Moyer notified the Secretary of Labor of his intention to file legal action against Elder-Beerman, and, after the elapse of 60 days from the notification, filed this action.

The complaint was filed in the United States District Court for the Southern District of Ohio on March 21, 1978. On December 5, 1978, District Judge Porter entered an order of reference appointing Magistrate Robert A. Steinberg as special master. The case was tried before the magistrate without a jury on May 21 and 22, 1979, and on July 18, 1979. Both sides submitted post-trial briefs, and on August 8, 1979, the magistrate filed his report and recommended decision, which recommended that judgment be entered in favor of defendant Elder-Beerman. Appendix 8a-14a. Plaintiff filed and both sides briefed a motion to review the magistrate's report. Judge Porter entered an order adopting the magistrate's report as the Court's own, and on January 16, 1980, judgment was entered in favor of Elder-Beerman. Appendix 15a-17a. On February 14, 1980, plaintiff filed his notice of appeal.

The Equal Employment Opportunity Commission moved to participate as amicus curiae, and was per-

mitted to file a brief in support of Moyer's appeal. The Sixth Circuit held oral argument on June 10, 1981, before Judges Weick, Cecil, and Merritt, and rendered its decision affirming the district court's judgment on July 8, 1981. Appendix 1a-5a. Judge Merritt filed a vigorous dissent. Appendix 5a-6a. On July 22, 1981, Moyer filed a petition for rehearing *en banc,* which the Sixth Circuit denied on September 10, 1981. Appendix 7a. On October 12, 1981, the Sixth Circuit issued its mandate.

B. Factual Background

Respondent Elder-Beerman Stores Corp. ("Elder-Beerman") is a retailing concern which operates numerous full line department stores. Elder-Beerman's department store operation is divided into various "departments," each of which contain a group of consumer products (Tr. 119).[1] The departments are grouped together in various "divisions," each of which is supervised by a divisional merchandise manager (Tr. 98-99). Buyers and assistant buyers report to the divisional merchandise managers (Tr. 98-99).

Before July 1977, the marketing effort in women's clothing was directed by two divisional merchandise managers, James Parkhurst and Darlene Meyer (A. 168). Parkhurst's area of responsibility was predomi-

[1]References to "Tr." are to the trial transcript and references to "A." are to the joint appendix filed in the Sixth Circuit. The record in this action has not been filed with this Court. References to the "Appendix" are to the appendix which is part of this petition.

nantly sportswear (A. 168) and Meyer's was predominantly dresses (A. 168). Sometime in the summer of 1977, Meyer decided she would resign (Tr. 263-264).

In August 1977, Barry Miller, then president of Elder-Beerman, asked his contacts in the clothing industry if they knew any potential candidates for a divisional merchandise manager of women's clothing (Tr. 104). Two of these contacts recommended appellant, James J. Moyer, and one arranged an interview with him (Tr. 104-105).

On August 10, 1977, Miller interviewed Moyer for a position as a divisional merchandise manager of women's clothing in respondent's organization (A. 120-121). At that interview Moyer submitted to Miller a resume detailing his extensive background in the department store industry and his age, 54 (A. 122, 195). In a letter dated August 12, 1977, Miller informed Moyer that he would not be hired by respondent Elder-Beerman. Miller stated in this letter that, "*My concerns relate to your age* and your time out of business" (emphasis added). Miller added, "I am not sure that *at this point in your career,* you would be the right candidate for us" (emphasis added). Appendix 18a.

Moyer's background well suited him for this position. After receiving his masters degree in retailing, he devoted most of his career to merchandising better women's wear (A. 112-119; Tr. 12-17). In nearly every position Moyer held, the volume of business which he supervised was larger than that envisioned for the position for which Elder-Beerman interviewed him (A. 112, 113, 114, 117, 171). Further, the positions

Moyer held were on a par or higher than that of divisional merchandise manager (A. 113, 116; Tr. 14, 15, 17).

All of the duties discussed by Miller with Moyer were allocated to younger men. The functions which would have been assigned to Moyer were assigned to either John Rocque or Parkhurst, both of whom are under 40 years of age. Parkhurst was then 26, and John Rocque then was 34. (A. 121; Tr. 68, 85-86).

Subsequent to becoming aware of Moyer's filing of a discrimination charge and an intent to sue notice, Kenneth Epstein, vice-president of personnel for respondent, arranged a meeting for Moyer with Elder-Beerman (A. 125). This meeting took place in January 1978 in Dayton, Ohio (A. 125). Elder-Beerman was represented by Epstein and Charles Waldron, then vice-chairman (A. 125). Before the meeting, Epstein had determined that Moyer would not be hired (A. 75, 160-161). Moyer was informed at that meeitng that there were no immediate openings in the Elder-Beerman organization for him (A. 126). To date, Elder-Beerman has never offered him any position.

BASIS FOR DISTRICT COURT JURISDICTION

The jurisdiction of the United States District Court for the Southern District of Ohio was based on 29 U.S.C. § 626(b) and § 626(c). Jurisdiction has not been contested at any point in the litigation.

REASONS FOR GRANTING WRIT

The decision of the Sixth Circuit in this case is seriously at odds with the Supreme Court's carefully articulated standards concerning burden of proof in employment discrimination cases, set forth in *Texas Department of Community Affairs* v. *Burdine,* 450 U. S. 248 (1981), and *McDonnell Douglas Corp.* v. *Green,* 411 U. S. 792 (1973). By allowing an employer to use after-the-fact rationalizations of employment decisions, based on facts learned in discovery, the Sixth Circuit opinion has turned the *Burdine* decision on its head. If the Sixth Circuit analysis announced in this case is allowed to govern, then the mere articulation of non-discriminatory reasons by an employer effectively provides a complete defense to a claim of employment discrimination, rather than a mere shifting of the burden of proof back to the plaintiff, as *Burdine* requires. The relevant question should not be whether an employer might have been able to reach the same decision based purely on permissible criteria, but whether illegal criteria *in fact* were significant, contributing factors.

If an employer is allowed to shore up its admittedly discriminatory actions by articulating at trial non-discriminatory factors not known to the employer at the time of the refusal to hire, then all an employer need do to provide a complete defense to a hiring discrimination case is to retain able counsel willing to pursue discovery diligently. As Judge Merritt of the Sixth Circuit remarked in his dissent, "Given the

opportunity for discovery . . . any defendant in an employment discrimination suit can find plausible reasons for its action. No job applicant is perfect; no employee is." Appendix 6a. To prevent this misapplication of *Burdine,* this Court should grant a writ of certiorari to review the Sixth Circuit's decision.

The magistrate, in his report and recommendation adopted by the district court, found in Moyer's favor virtually all of the facts which Moyer set out to prove. The magistrate found that Miller, president of Elder-Beerman, had the authority to reject Moyer's application (Appendix 9a); he found that age was a factor in Miller's decision not to offer Moyer a job (Appendix 10a); he found that not only was Moyer qualified for the position (Appendix 12a), but that Moyer did not have to prove that he would have been hired even if age were not a factor (Appendix 11a).

The magistrate also found that the second interview with Moyer, arranged by the company after Moyer had notified the Secretary of Labor of his intent to file an age discrimination action against Elder-Beerman, was "not held for the purpose of determining whether to hire Moyer. Appendix 13a. Most significantly, the magistrate specifically disbelieved Miller's trial testimony and found "the plain meaning" of Miller's letter to be that age was a reason why Moyer was not hired. Appendix 12a.

In spite of all of these findings, the magistrate concluded that no discrimination had occurred. In arriving at such an incongruous conclusion, the magistrate failed to grasp the significance of the direct admission

by Elder-Beerman that it rejected Moyer for discriminatory reasons. The magistrate misapplied the standard of proof and concluded that Moyer had merely established a prima facie case rather than a proven act of discrimination. The Sixth Circuit approved this manifest error.

The magistrate in his report—adopted completely by the district court—identified three purported justifications supporting Elder-Beerman's so-called "good faith business judgment" not to hire Moyer:

(i) Moyer was not actively involved in the fashion market for a period of seven months before the Elder-Beerman interview.

(ii) Moyer's own retail shop went into bankruptcy in February of 1977; and

(iii) Moyer had been an officer of two department stores that had gone into bankruptcy after his departure from them.

Appendix 12a-13a. Yet factors (ii) and (iii) were not known to Barry Miller at the time of the interview and rejection letter, and therefore could not possibly have been "contributing factors" to the August 12, 1977 decision not to hire (A. 143-144, 163; Miller dep. at p. 30, q. 127-129).

Implicitly rejecting factors (ii) and (iii) above as not contemporaneous with the rejection letter, the Sixth Circuit panel opinion cites only two non-discriminatory reasons for the refusal to hire;

(a) Moyer's "seven month absence from the retailing field"; and

(b) "The size and quality of retail establishments he had been associated with over recent years was another important and justifiable concern."

Appendix 4a. Factor (a) in the Sixth Circuit opinion is, of course, the same as factor (i) in the Magistrate's report. It is a legitimate and nondiscriminatory reason, albeit of little weight. However, factor (b)—the "size and quality" of Moyer's most recent employers—is *nowhere* mentioned in the magistrate's findings of fact as a reason actually relied upon by Miller in writing his August 12, 1977 letter. This leaves only one minor, nondiscriminatory element—seven short months of looking for a job as an over-50 executive. Remaining, of course, is the predominant motive of age.

Inexplicably, the Sixth Circuit treated the repeated references to age in the August 12, 1977 letter as a means of letting Moyer down gently:

> Here, Miller provided a reasonable explanation of the psychology that prompted him to emphasize age rather than the absence of other qualifications in his rejection letter. Obviously ignorant of the law, he testified that he thought a reference to age provided a gentler ground for rejection than other grounds might have been.

Appendix 5a. This analysis is completely wrong. First, the uncontradicted testimony of Miller is that he did know of the ADEA at the time he wrote the

letter, and therefore was not "ignorant of the law" (Tr. 115). Second, the magistrate specifically found that Milier was in fact relying on age as a serious negative factor in the refusal to hire, and there is no basis for the Sixth Circuit's apparent determination that Miller meant something other than age when he wrote the letter. Appendix 12a. Finally, the suggestion that citing illegal discrimination is a way to "let an applicant down easy" is itself grotesque.

A detailed set of rules concerning burden of proof and causation has developed in employment discrimination cases. The reason these rules are necessary is that employment discrimination is a matter of illegal motive. It is not by itself illegal to refuse to hire a black for a job as a bank executive. It is illegal to refuse to hire a black for the same bank position "because of [his] race. . . ." 42 U.S.C. §2000e-2. The issue is one of determining the existence of illegal motive in the employment decision, and the human psyche is remarkably opaque when the law attempts to see if the motive is good or bad. As the Eighth Circuit noted in its opinion in the *McDonnell Douglas* case:

> Employers seldom admit racial discrimination. [Citation omitted.] Its presence is often cloaked in generalities or vague criteria which do not measure an applicant's qualifications in terms of job requirements. Consequently, a . . . job applicant must usually rest his case of discrimination upon proof that he possessed the requisite qualifications to fill the position which was denied him.

Green v. *McDonnell Douglas Corp.*, 463 F. 2d 337, 343 (8th Cir. 1972), *vacated and remanded*, 411 U. S. 792 (1973). *Moyer* v. *Elder-Beerman* is the rare example where discrimination is flatly admitted.

There is seldom but a single reason for any employment decision. The Sixth Circuit itself recognized the multiple causation issue: ". . . [T]here could, as in the tort concept of approximate cause, be more than one factor in a decision to hire or fire." Appendix 4a. Thus, various tests have been formulated for causation: (i) that age be "a determining factor"; (ii) that age be "the determinative factor"; (iii) that age be a "but for" factor; or (iv) that age discrimination be "somehow determinative" of the adverse employment decision. See *Laugesen* v. *Anaconda Co.*, 510 F. 2d 307 (6th Cir. 1975); *Mastie* v. *Great Lakes Steel Corp.*, 424 F. Supp. 1299 (E.D. Mich. 1976); *Loeb* v. *Textron, Inc.*, 600 F. 2d 1003 (1st Cir. 1979); *Smithers* v. *Bailar*, 629 F. 2d 892 (3rd Cir. 1980).

These rules concerning burden of proof and causation are necessary in the analysis of the usual individual discrimination case. But they assume much less significance in the analysis of the unusual case of written admission of discrimination. In this case, the president of the defendant company stated in writing that he was not going to hire Moyer because "my concerns relate to your age and your time out of the business." As if to reinforce this unmistakably illegal statement, the president went on to say, "I am not sure that, at this point in your career, you would be the right candidate for us." Appendix 18a. This is so raw and

direct a case of age discrimination as any court will confront. In affirming the judgment for the defendant, the Sixth Circuit has misapplied these usual rules of burden of proof and causation to reach an unjust result. The possible existence of legitimate reasons why Elder-Beerman might have rejected Moyer, had it fairly considered him, does not prove the absence of discrimination here, where there is direct evidence that age was dispositive.

In summary, when post hoc justifications and factors not identified by the fact finder as playing any part in the actual rejection decision are weeded out, only two elements remain: the minor blemish of seven months of intensive job search, and the written, repeated declaration of the respondent's president that Moyer would not be hired because of his age. Under governing standards of the burden of proof in employment discrimination cases annunciated by this Court, the Sixth Circuit should have reversed rather than affirmed the district court. If allowed to stand, the Sixth Circuit opinion will rewrite the *Burdine* decision and eviscerate federal employment discrimination law.

This Court should grant certiorari to review the matter and to prevent this serious undercutting of important federal legislation.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to the United States Supreme Court Rules, I hereby certify that three copies of this Petition for Writ of Certiorari were served this 8th day of December, 1981, on Roger Makley, Esq. and James R. Levinson, Esq., Coolidge, Wall, Matusoff & Wolmsley, Suite 600, IBM Building, Dayton, Ohio 45402, Counsel for Respondent Elder-Beerman Stores Corp.

ROBERT G. BREETZ

APPENDIX

APPENDIX A

No. 80-3171

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JAMES J. MOYER, - - - - *Plaintiff-Appellant*

v.

THE ELDER-BEERMAN STORES CORP., - - - - - *Defendant-Appellee*

ORDER—Filed July 8, 1981

Before: WEICK and MERRITT, Circuit Judges; CECIL, Senior Circuit Judge.

Plaintiff-appellant, James J. Moyer, appeals a judgment entered against him after trial by a magistrate on his claim that Elder-Beerman Stores, Inc., discriminatorily refused to hire him on account of his age, in violation of the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* He argues that the magistrate improperly applied relevant law in concluding that Elder-Beerman had legitimate non-discriminatory reasons for refusing to hire him. We affirm, finding that there were sufficient non-age-related reasons to justify Elder-Beerman's action.

In August 1977, an industry contact of Barry Miller, president of Elder-Beerman, arranged an interview between Miller and Moyer, who was then 54, for the position "Divisional Merchandise Manager" of a women's wear division. Miller had the power to reject applicants but not

the power to hire without consultation with his superiors. After an hour interview, Miller sent Moyer this rejection letter:

> It was a pleasure chatting with you the other day. I feel that you have excellent qualifications and should not find it very difficult to get yourself reassociated with merchandising.
>
> My concerns relate to your age and your time out of the business. We have to have a merchandiser who can quickly help us pick up the slack and get positively involved with some of the projects that must be accomplished at Elder-Beerman.
>
> I am not sure that, at this point in your career, you would be the right candidate for us. We do wish you success in your future and that you soon find the right position for your capabilities.

It is undisputed that Elder-Beerman did more interviewing for the position Moyer sought (App. 113). The parties do not agree on whether the position was filled. The magistrate apparently found that it was not, because the new department Moyer might have had responsibility for was never created (App. 72). Moyer responds that all the duties he would have held were given to other employees, in large part to a 34-year-old hired a month after Moyer's rejection.

In January 1978, after learning that Moyer had filed a notice of intent to sue, representatives of Elder-Beerman held another meeting with Moyer. The magistrate found they had decided before the meeting that they would not hire him, and they so informed him at the meeting. Moyer held no job after February 1977, when a women's wear shop he owned himself went bankrupt, for more than a year and a half. Despite active work with four or five executive

recruiters, he received just two interviews with principals of retailing companies (App. 132, 135). The job he eventually received provided compensation of a loan against future earnings of $9600 per year (App. 137).

After trial, the magistrate found that Moyer had established a *prima facie* case of discrimination; he found that age was a factor in the decision not to hire (App. 71). But he found that Elder-Beerman had rebutted the *prima facie* case by demonstrating other, legitimate reasons for not hiring him; he had not been active in merchandising in the fashion market for at least seven months; the women's wear store he had owned and run before applying to Elder-Beerman had failed; and some business judgments made while he was employed by other firms were suspect. The magistrate's opinion including his findings of fact and conclusion of law was approved and adopted in full by the district court. It was supported not only by evidence offered at the trial but also by pretrial depositions.

Moyer essentially makes three arguments. He argues (1) that the magistrate misapplied the test of *Laugesen* v. *Anaconda Co.*, 510 F. 2d 307 (6th Cir. 1975) by effectively demanding that Moyer demonstrate not just that age was *a* reason for his not being hired, but that it was *the* determinative reason; (2) that *post hoc* justifications for a refusal to hire should be irrelevant to the court's decision; and (3) that the magistrate should have found that the letter established a conclusive, not just a *prima-facie*, case. We find none of the arguments persuasive, and we treat them in turn.

(1)

In *Laugeson*, the court reversed a judgment entered on a jury verdict for the defendant because the instructions

> failed to make it clear that even if more than one factor affected the decision to discharge [the plaintiff], he could nonetheless recover if one factor was his age and it in fact made a difference in determining whether he was to be retained or discharged.

510 F. 2d at 310. The court emphasized that there could, as in the tort concept of proximate cause, be more than one factor in a decision to hire or fire. A plaintiff can recover even if another factor is "a strong, and perhaps even more compelling reason." *Id.* at 317. The central dispute between the parties turns on the "in fact made a difference" language, Elder-Beerman arguing that reasons other than age were sufficient to deny Moyer a job. Moyer seeks here to turn what is actually a dispute over a factual finding into a legal dispute, because the magistrate concluded that Moyer need not prove that he would have been hired but for his age, a standard arguably incompatible with but certainly as pro-plaintiff as that of Laugeson (App. 73 n.1). The magistrate did not commit clear error in finding that Moyer's seven-month absence from the retailing field justified Elder-Beerman's refusal to hire him. The size and quality of retail establishments he had been associated with over recent years was another important and justifiable concern. Moyer's failure to secure comparable jobs with other large retailers supports the conclusion that Elder-Beerman's decision was not determined by discriminatory motives.

(2)

Moyer argues that the magistrate improperly considered *post hoc* justifications for Elder-Beerman's refusal to hire. Moyer argues that only the information known to Miller at the time he wrote his rejection letter should be considered by the court. Because we conclude that the

reasons for refusing to hire enumerated in the paragraph above are sufficient to justify Elder-Beerman's decision, no additional and possibly inappropriate reasons tendered by the magistrate affect our decision.

(3)

Finally, Moyer claims that in cases such as his, in which a defendant has made an admission of some discrimination, the court should not concern itself with the analysis of the *prima facie* case that *Laugeson* incorporates from *McDonnell Douglas* v. *Green*, 411 U. S. 792 (1973), but rather should hold that the plaintiff has conclusively satisfied his burden of proof. No case Moyer cites supports that proposition. Though some admissions may alone be so compelling as to support a finding of discriminatory action, admission of some discriminatory motive need not always do so. Here, Miller provided a reasonable explanation of the psychology that prompted him to emphasize age rather than the absence of other qualifications in his rejection letter. Obviously ignorant of the law, he testified that he thought a reference to age provided a gentler ground for rejection than other grounds might have been.

Accordingly, the judgment of the district court is affirmed.

Entered by order of the court.

/s/ John P. Hehman, Clerk
By Deputy Clerk (Not legible)

MERRITT, Circuit Judge, dissenting. The Age Discrimination in Employment Act provides quite simply that "It shall be unlawful for an employer . . . to fail or refuse to hire . . . any individual . . . because of such individual's age. . . ." 29 U.S.C. § 623(a)(1). The statute

is designed to deter actions based on wrongful intent. As is always the case in areas of law that are concerned with states of mind, direct proof of wrongful intent is usually unavailable. In this case, such proof is as direct as it can ever be. Where there are several stated reasons for a discharge or refusal to hire, the wrongful stated purpose should itself make the act unlawful, because part of the purpose of the act is to prohibit age-related justifications for actions.

The fundamental error in the magistrate's opinion is his acceptance as justifications for Elder-Beerman's action considerations that did not play a role in its actual decision. There is no evidence in the record that Miller relied on or even knew of the bankruptcy of Moyer's business or of the financial difficulties of other businesses with which he had been associated. Yet the magistrate relied on both of those factors in accepting Elder-Beerman's explanation for its refusal to hire (App. 71-72). Given the opportunity for discovery—or given even the opportunity for further post-decision interviews of the kind Elder-Beerman held with Moyer—any defendant in a discrimination suit can find plausible reasons for its action. No job applicant is perfect; no employee is.

Because I believe the effect of the majority's decision is to legitimize the sort of employer action the Act was meant to prohibit, I respectfully dissent.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 80-3171

JAMES J. MOYER, - - - - *Plaintiff-Appellant*

v.

THE ELDER-BEERMAN STORES CORP., - - - - - *Defendant-Appellee*

ORDER—Filed September 10, 1981

Before WEICK and MERRITT, Circuit Judges and CECIL, Senior Circuit Judge.

The majority of the active judges of this court not having voted in favor of en banc consideration of the petition for rehearing, said petition was referred to the panel for determination.

Upon consideration, we are of the opinion that the issues of this case were adequately treated in our order and it therefore ORDERED that said petition for rehearing be and it is hereby denied.

Judge Merritt dissents.

Entered by Order of the Court
/s/ John P. Hehman, Clerk

APPENDIX C

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. C-1-78-708

JAMES J. MOYER, - - - - - - - *Plaintiff,*

v.

ELDER BEERMAN STORES CORPORATION, - - - - - - - *Defendant.*

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE—Filed August 9, 1979

This case is before the Court after a trial on the merits. Plaintiff James J. Moyer brought this action pursuant to the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et. seq.*, claiming that Plaintiff was discriminatorily denied employment with Defendant on the basis of his age. The case was tried to the Court without a jury. The Court, having considered the pleadings, stipulations of the parties, documents in evidence and the testimony of witnesses, hereby makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. Plaintiff James J. Moyer is a citizen of the United States and a resident of Pennsylvania. Plaintiff was born in 1923 and was fifty-four (54) years old at the time of the act here in question.

2. Defendant Elder Beerman Stores Corporation (Elder Beerman) is an Ohio corporation having its principal office in the Southern District of Ohio. Elder Beerman is engaged in the retail marketing of clothing and other products and employs personnel to perform buying and merchandising functions. Defendant is an employer within the meaning of the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et. seq.*

3. During the summer of 1977, Defendant considered the creation of a new division to sell better women's apparel.

4. On August 10, 1977, Plaintiff was interviewed by Barry Miller, President of Elder Beerman, to evaluate Plaintiff as a candidate for the potential position of divisional merchandise manager of better women's apparel. At that interview, Plaintiff presented Mr. Miller with his resume, which gave his age as fifty-four.

5. Although Mr. Miller did not have authority to hire Plaintiff without the approval of the Chairman of the Board, he did have authority to reject Plaintiff's application.

6. In a letter to Plaintiff dated August 12, 1977, Mr. Miller wrote:

> "It was a pleasure chatting with you the other day. I feel that you have excellent qualifications and should not find it very difficult to get yourself reassociated with merchandising.
>
> My concerns relate to your age and your time out of the business. We have to have a merchandiser who can quickly help us pick up the slack and get positively involved with some of the projects that must be accomplished at Elder-Beerman.
>
> I am not sure that, at this point in your career, you would be the right candidate for us. We do wish you

success in your future and that you soon find the right position for your capabilities."

7. Plaintiff's age was a factor considered by Mr. Miller in his decision not to offer the position of divisional merchandise manager to Plaintiff. However, even had age not been considered, Defendant would not have hired Plaintiff because of other legitimate business factors which were unrelated to Plaintiff's age.

8. Defendant believed that Plaintiff was unsuited for the prospective position of divisional merchandise manager due to his lack of recent activity in the fashion market, the fact that Plaintiff's own business had not been successful, and Defendant's suspicions regarding the quality of plaintiff's business judgments while employed with other firms in the past.

9. The potential division of better women's apparel has never been created by Defendant, and no one has ever been hired as merchandise manager of that division.

OPINION

This matter is properly before the Court pursuant to 29 U.S.C. § 623 *et seq.*, all preliminary requirements for invoking jurisdiction having been met.

Plaintiff alleges that Defendant discriminated against him on the basis of his age by refusing to hire him into a managerial position. Defendant contends that Plaintiff was not offered the position of divisional merchandise manager of better women's apparel because he was not qualified for the position.

The Age Discrimination in Employment Act of 1967 makes it "unlawful for an employer to fail or refuse to hire . . . any individual . . . because of such individual's age . . ." (29 U.S.C. § 623(a)(1)), for the stated purpose of outlawing arbitrary age discrimination.

Plaintiff has the burden of establishing by a preponderance of the evidence that Defendant's failure to hire him was the result of age discrimination. This may be proven by showing that age was a determinative factor in Defendant's decision not to hire Plaintiff. A "determinative factor" is a factor that makes a difference in reaching the determination not to hire an individual. *Laugeson* v. *Anaconda Company,* 510 F. 2d 307 (6th Cir. 1975), *Mastie* v. *Great Lakes Steel Corp.,* 424 F. Supp. 1299, 1321 (E.D. Mich. 1976), *Carpenter* v. *Continental Trailways,* 446 F. Supp. 70, 73-74 (E.D. Tenn. 1978).

The establishment of a prima facie case of age discrimination requires proof of facts from which, if they remain unexplained, one can infer that it is more likely than not that Defendant's acts were based upon the consideration of impermissible factors. *Furnco Construction Corp.* v. *Waters,* 438 U. S. 567 (1978). Once Plaintiff has established a prima facie case, the burden of going forward shifts to Defendant to articulate a legitimate, non-discriminatory reason for its actions. *Marshall* v. *Westinghouse Electric Corp.,* 576 F. 2d 588 (5th Cir. 1978).[1] Once a legitimate reason for the determination not to hire Plaintiff is articulated, Defendant has no further burden. The burden of going forward then shifts back to Plaintiff to establish that the reason given by Defendant is pretext. The ultimate burden of persuasion on the issue of discrimination always remains with Plaintiff, who must convince the Court

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[1]In this case, Defendant alleges that Plaintiff would not have been hired even if age were not a consideration. We do not believe it is proper to require Plaintiff to disprove this negative fact, which involves subjective decisions of Defendant's management. See *Cramer* v. *Virginia Commonwealth University,* 415 F. Supp. 673 (E.D. Va. 1976); *vacated on other grounds,* 586 F. 2d 297 (5th Cir. 1978). We feel that the burden of going forward on this issue is more appropriately placed upon Defendant.

by a preponderance of the evidence that he has been a victim of discrimination. *Board of Trustees* v. *Sweeney*, ____ U. S. ____, 99 S. Ct. 295 (1978); *Havelick* v. *Julius Wile Sons & Co., Inc.*, 445 F. Supp. 919 (S.D. N.Y. 1978).

At trial, Barry Miller, President of Elder Beerman, testified that Plaintiff's age was not a factor in the determination not to hire him. This testimony is rebutted by the letter Mr. Miller wrote to Plaintiff in which he noted that "my concerns relate to your age and your time out of the business." The Court finds the plain meaning of Mr. Miller's letter to be more persuasive than his testimony at trial. From this evidence along with evidence of Mr. Moyer's basic qualifications for the position,[2] we believe Plaintiff established a prima facie case of age discrimination.

Defendant then established that Plaintiff was not selected for the prospective position of divisional merchandise manager of better women's apparel due to legitimate business considerations. The evidence indicates that the field of women's fashion is volatile and rapidly changing. Given the highly competitive nature of the market place, a premium is placed on current experience and a "feel" for fashion trend.

The evidence showed that Mr. Moyer was not actively in the market in any merchandising capacity for at least seven months prior to his interview with Mr. Miller. His

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[2]We do not believe it is appropriate to require Plaintiff to show that he was "qualified" for the position, in the sense of meeting all the subjective and unwritten criteria necessarily involved. We believe that Plaintiff's background in merchandising women's wear, together with the letter of August 12, 1977, referring to Plaintiff's "excellent qualification", are sufficient to warrant a finding that he was "qualified" in the sense of making out a prima facie case. The burden of going forward then shifts to Defendant to demonstrate that Plaintiff was rejected for legitimate business reasons.

last experience with women's wear was his ownership of a "specialty shop" in Harrisburg, Pennslvania. This shop opened in September of 1975 and went into voluntary bankruptcy in February of 1977. Prior to this time, two department stores of which Plaintiff was an officer went into bankruptcy shortly after he left their employ.

Despite the fact that, at the time of Plaintiff's initial contact with Mr. Miller, he was found unsuited for the job for which Defendant was seeking applicants, Plaintiff was re-interviewed by Charles Waldron, then Vice-Chairman of the Board of Defendant Elder Beerman. This interview was precipitated, at least in part, by Defendant's knowledge that Plaintiff had notified the Secretary of Labor of his intent to file an age discrimination action against Defendant. Mr. Epstein, the Personnel Director, testified that he reviewed Plaintiff's resume prior to scheduling the interview and determined that he would not hire him. Thus, for whatever purpose the interview was held, it was not held for the purpose of determining whether to hire Mr. Moyer.

Nonetheless, it is clear from all the testimony and evidence in the record, that Defendant did not hire Plaintiff because it believed him to be unsuited for the prospective position. The position envisioned by Defendant would have required considerable discretionary judgment in the fashion industry and in the financial aspects of supervising a complex and sensitive aspect of Defendant's operations. The Court finds that Defendant believed that Plaintiff lacked the business acumen and current sense of the market to satisfactorily accomplish the duties of divisional merchandise manager. Thus, the decision not to hire Mr. Moyer was made in the exercise of good faith business judgment and not as a result of discrimination on the basis of age.

CONCLUSIONS OF LAW

1. This matter is properly before the Court pursuant to 29 U.S.C. § 621 *et seq.*, all preliminary requirements for invoking jurisdiction having been met.

2. Plaintiff is in the protected age group established by the Age Discrimination in Employment Act.

3. The Age Discrimination in Employment Act of 1967 makes it unlawful for an employer to fail or refuse to hire any individual because of such individual's age.

4. Plaintiff has failed to establish by a preponderance of the evidence that age was a determinative factor in Defendant's decision not to hire Plaintiff.

RECOMMENDED DECISION

IT IS THEREFORE RECOMMENDED THAT:

Plaintiff James J. Moyer take nothing upon his Complaint and judgment be entered in favor of Defendant Elder Beerman Stores Corporation.

(s) Robert A. Steinberg
United States Magistrate

Date: August 8, 1979

APPENDIX D

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Civil Action File No. C-1-78-708

JAMES J. MOYER, - - - - - - - *Plaintiff,*

v.

THE ELDER-BEERMAN STORES CORP., - - *Defendant.*

JUDGMENT—Filed January 16, 1980

This action came on for hearing before the Court, Honorable David S. Porter, United States District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered,

It is Ordered and Adjudged that the issues are found in favor of the defendant, THE ELDER-BEERMAN STORES CORPORATION, and against the plaintiff, JAMES J. MOYER.

Dated at Cincinnati, Ohio, this sixteenth day of January, 1980.

John D. Lyter
Clerk of Court

(s) Elizabeth E. Schaeffer
Deputy Clark

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

No. C-1-78-708

JAMES J. MOYER, - - - - - - - *Plaintiff,*

v.

THE ELDER-BEERMAN STORES CORP., - - *Defendant.*

ORDER—Filed January 16, 1980

This age discrimination case was referred to the Honorable Robert A. Steinberg, United States Magistrate, pursuant to 28 U.S.C. § 636(b)(1) and (2) and Western Division Rule No. 1, Steinberg being appointed as Special Master. He was directed to hold hearings, receive evidence and report to the Court his recommended decision in this action (doc. 21).

The case was pretried and noticed for hearing and eventually, the Master filed a Report and Recommendation (doc. 35). Notice was issued to the parties that they could object within ten days after being served with a copy (doc. 36) and the plaintiff filed a motion to review the Magistrate's Report and Recommendation, supported by a memorandum (doc. 41). This was opposed (doc. 42), and there was a reply memo (doc. 43).

The transcript of the proceedings was filed October 9, 1979 (doc. 40).

After review of the submissions, the Court finds that none of the Magistrate's findings of fact are clearly erron-

cous and furthermore, determines that the Magistrate's statement of the law applicable is accurate. There was no objection to the Magistrate's "conclusion of law," except as to number four (doc. 41, paragraph 7). The conclusion of law number 4 was as follows:

> "Plaintiff has failed to establish by a preponderance of the evidence that age was a determining factor in defendant's decision not to hire plaintiff."

There is nothing wrong with that.

The Court recognizes the parties are entitled to a real review by the Court to determine whether the findings were clearly erroneous. Wright & Miller, Federal Practice and Procedure § 6214, Volume 9, page 810.

After a review of the relevant portions of the transcript (doc. 40), the Court finds itself in agreement with the findings of the Magistrate, *i.e.*, the Court concludes that the Magistrate's findings are not clearly erroneous.

The Court hereby rejects the objections to the Magistrate's Report. The Court approves and adopts as its own the Report of the Magistrate and accordingly finds on the issues in favor of the defendant and against the plaintiff.

Accordingly, it is ordered that the plaintiff, James J. Moyer, take nothing upon his complaint, and judgment be entered in favor of the defendant The Elder-Beerman Stores, Corp.

So Ordered.

/s/ David S. Porter
United States Senior District Judge

APPENDIX E

(LETTERHEAD OF ELDER-BEERMAN)
August 12, 1977

Mr. James Moyer
P. O. Box 267
Eagle Mere
Pennsylvania 17731

Dear Jim:

It was a pleasure chatting with you the other day. I feel that you have excellent qualifications and should not find it very difficult to get yourself reassociated with merchandising.

My concerns relate to your age and your time out of the business. We have to have a merchandiser who can quickly help us pick up the slack and get positively involved with some of the projects that must be accomplished at Elder-Beerman.

I am not sure that, at this point in your career, you would be the right candidate for us. We do wish you success in your future and that you soon find the right position for your capabilities.

Sincerely,
The Elder-Beerman Stores Corp.

/s/ Barry Miller
President

BM/r

Opposition

81-1073

NO. 81-10732

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JAN 11 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

JAMES J. MOYER,

Petitioner,

vs.

ELDER-BEERMAN STORES CORP.,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Respondent respectfully submits that the question Petitioner presented for review does not validly arise upon the record because the employer's nondiscriminatory reasons for rejecting petitioner-job applicant were known to the employer at the time of rejection.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

NO. 81-10732

JAMES J. MOYER,

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vs.

ELDER-BEERMAN STORES CORP.,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

STATEMENT OF THE CASE

A. Procedural Background.

Respondent adopts Petitioner's Statement of the Case as to Procedural Background, except insofar as it excerpts portions of a letter out of context.

B. Factual Background.

Respondent Elder-Beerman Stores Corp. ("Elder-Beerman") operates twenty department stores ranging in size

from 40,000 to 285,000 square feet. (Tr. 248)[1]. The functions of selecting, buying, displaying and promoting the stores' stock, together with financial planning and budgeting for stock purchases and inventory, is termed "merchandising." This case concerned an applicant for a position in merchandising high-priced women's clothing.

At Elder-Beerman, the merchandising function is organized by departments and divisions. Any given women's clothing department buys, stocks and sells goods that are internally similar in terms of resource (manufacturer or supplier), structure (blend of resources), price range, customer delineation (the type of customer to which the clothes are meant to appeal) and "looks" or style. (Rocque depo., pp. 9, 13-14, 16; Tr. 119-120).[2] Department heads are termed "Buyers."

Departments are grouped into various divisions, headed by Divisional Merchandise Managers. Elder-Beerman's five divisions which merchandise women's clothing include a dress division and a sportswear division. Each of the divisions, through its departments, merchandises all prices of garments, from "budget" (the cheapest) through "better" (the highest priced). Due in part to the fact only three of Elder-Beerman's twenty stores carry "better" women's apparel, sales of that apparel accounted for only 5 — 8% of the dress and sportswear divisions' sales. "Budget" and "moderate" apparel accounted for 92 — 95% of the divisons' sales. (Tr., 186-188, 248, 252).

At one time, Elder-Beerman's management contemplated

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[1] "Tr." refers to pages of the trial transcript which were not included in the Agreed Joint Appendix filed with the United States Court of Appeals for the Sixth Circuit.

[2] "Rocque depo." refers to pages of the transcript of John Rocque's deposition which was admitted into evidence at Tr., 66.

separating out the sportswear and dress divisions' "better" departments and combining them to form a new division for better women's apparel. That reorganization would necessarily have entailed promoting or hiring someone to be divisional merchandise manager for a better women's apparel division. (JA, 169-170).[3]

Only Elder-Beerman's Chairman and Chief Executive Officer, Mr. Gutmann, had authority to hire personnel at the level of divisional manager. However, others in the organization frequently held preliminary interviews of candidates for various positions. If favorably impressed, the others would arrange further interviews, leading eventually to consideration by Mr. Gutmann. Barry Miller was one who conducted preliminary interviews when he was "in the market" in New York City. (Tr., 134-35; JA, 173).

While Elder-Beerman actively considered creating a better women's apparel division, a market acquaintance of Barry Miller named Helen Wilson told him she had someone with Lord & Taylor background for him to interview. Miller interviewed Moyer as a candidate for divisional merchandise manager of the proposed better women's apparel division while in New York City in August, 1977. (Tr., 99, 130-131, 135).

During the interview, which lasted one hour, Miller saw Moyer's resume for the first time and learned that Moyer had not worked at Lord & Taylor since 1964. The two men discussed the promotion, the organization and the problems of a better apparel division; resources and the structure, or blend of resources, for a business; and Moyer's previous experience. (Tr., 29-31, 108, 110; JA, 173-176).

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[3] "JA" refers to pages of the Agreed Joint Appendix filed with the United States Court of Appeals for the Sixth Circuit.

Miller concluded that Moyer's "feel" for fashion was not "current" and "with it," that his employment experience since Lord & Taylor had gone down to stores of no success or importance, that Moyer had shown poor business judgment and was not dynamic. Miller did not refer Moyer for further consideration. (JA, 119, 163, 173, 176).

Trial of Moyer's subsequent age discrimination suit was held before a United States Magistrate, appointed as Special Master, without the intervention of a jury. He concluded that plaintiff established a prima facie case. Elder-Beerman then articulated its legitimate, nondiscriminatory reasons for not hiring Moyer. (JA, 74). The magistrate was persuaded by the evidence that defendant established it had not selected plaintiff due to legitimate business considerations. (JA, 74). Those considerations included Moyer's lack of recent activity in the market, his own business' failure and previous suspect business judgments. They caused Barry Miller to believe in good faith that Moyer was unsuited for the position due to lack of business acumen and current sense of the market. (JA, 71, 75).

The United States District Court for the Southern District of Ohio conducted a review, including a review of relevant transcript portions, and agreed with the Magistrate's findings. The Court adopted those findings as its own and accordingly entered judgment in favor of the defendant. (JA, 107-110).

The United States Court of Appeals for the Sixth Circuit affirmed the district court's judgment. It specifically held that defendant's nondiscriminatory reasons for refusing to hire plaintiff, known to defendant at the time of rejection, sufficiently justified defendant's decision. (Appendix to Petition for Writ of Certiorari, 4a-5a).

ARGUMENT

PETITIONER'S QUESTION FOR REVIEW, WHICH CONCERNS POST HOC REASONS FOR REJECTING AN APPLICANT, DOES NOT ARISE ON THIS RECORD, WHERE THE REASONS DEFENDANT ARTICULATED WERE KNOWN BEFORE REJECTION.

The single question Petitioner presented for review attacks the legitimacy of defendant's articulated nondiscriminatory reasons for rejecting Moyer for employment. Petitioner asserts that the reasons were unknown to defendant at the time of rejection.

In fact, the record here unequivocally supports the lower courts' findings that defendant rejected Moyer on the basis of its good faith business judgment that he was unsuited for the contemplated position by reason of information garnered and evaluations made during Miller's interview with Moyer.

The reasons articulated by defendant and credited by the Magistrate for Moyer's rejection were therefore known to the defendant at the time of the rejection, which followed the interview.

The Magistrate who sat as trier of fact concluded that in its good faith business judgment, defendant believed "Plaintiff lacked the business acumen and current sense of the market to satisfactorily accomplish the duties of divisional merchandise manager." (JA, 75).

Page after page of the trial transcript records evidence which educated the court in the importance Elder-Beerman attached to hiring merchandisers who were currently active in the market. The business of high-fashion women's

apparel is volatile and rapidly changing. In order to be profitable, merchandisers must have a "feel" for trends in style, color, labels and prices that will sell. That feel, or judgment, comes from imagination, intuitiveness, constant testing and keeping current in market developments. These, in turn, require being current in the market, that is, keeping up strong personal relationships with resource personnel. Keeping those relationships current is also essential to financial aspects of buying, such as early deliveries, return privileges, and promotional advantages. (JA, 182-184; Tr., 139-140).

A person who is out of the market for six months could take a full one or two seasons to catch up on the feel of the trends. (JA, 182-183). Therefore, Elder-Beerman has never hired a divisional merchandise manager who was not currently working in the market at the time of hire. (JA, 159).

Not all involvement in the market is equally valuable. Elder-Beerman looked for a person who was in the market merchandising for a successful store in the field of high fashions.

Lord & Taylor was known to Miller as a successful store in the high fashion business. Its personnel had the "major better store kind of experience" needed for the contemplated job. (JA, 164; Tr., 131).

Miller interviewed Moyer because Helen Wilson said he was a man with Lord & Taylor background. At his interview with Moyer, however, Miller learned that Moyer had left Lord & Taylor thirteen years earlier. Miller would not even have held the interview if he had known Moyer's Lord & Taylor experience was not current. (JA, 173).

Since Lord & Taylor, Moyer's progress was "down and down," from a successful store in the New York fashion

market to stores Miller never heard of in Oklahoma and Harrisburg, Pennsylvania. (JA, 135). As a man who had been in the business over twenty years and who was very familiar with "all of the large stores in the country and most of the successful ones," Miller evaluated those stores as unsuccessful and unimportant. (JA, 163, 174).

Miller learned at the interview that Moyer's most recent experience was operating his own specialty shop in Harrisburg, Pennsylvania. Moyer admitted he had had to sell out his business due to lack of capital after less than two years of operation. Finally, Miller learned that Moyer had not been actively merchandising in the market in any capacity for at least seven months at the time of their meeting. (Pl. Ex. 2, JA, 122; JA, 31).

Nevertheless, Miller's interview with Moyer lasted an hour. Their discussion ranged over the promotion, the organization and the problems of a better apparel division and resources and the structure, or blend of resources, for a business. Miller evaluated Moyer as a man who "was not in the business and didn't know what was going on," a conclusion reinforced by Moyer's discussion of a "contemporary" resource that "in no way, shape or form" had been "contemporary" for five or ten years. (JA, 135-137).

The Magistrate understood that the contemplated position at Elder-Beerman required considerable discretionary judgment in the fashion industry. He found that Elder-Beerman, in its good faith business judgment, believed plaintiff to be unsuited for the prospective position because he lacked the current sense of the market to satisfactorily accomplish the duties of the position. Miller had attributed that lack to Moyer's being out of the market, which is reflected in the Magistrate's findings of fact as "lack of recent activity in the fashion market." (JA, 71-72).

The Sixth Circuit referred to this finding, by way of summary, as the magistrate's "finding that Moyer's seven-month absence from the retailing field justified Elder-Beerman's refusal to hire him." It specifically held that finding not to be clearly erroneous. (Appendix to Petition for Certiorari, 4a.)

Elder-Beerman sought a divisional merchandise manager with aptitude in financial and business, as well as fashion, matters. The new division it contemplated would include departments with annual sales of two to two and a half million dollars to begin with. (Tr., 107). At Elder-Beerman, all decisions respecting the purchase of inventory must be made within the six-month plan, which allocates in advance each department's budget for every store and every item stocked. The divisional manager is responsible for developing that plan and achieving it in the market by supervisiong buyers' contract terms in the market. He is also responsible for this division's advertising, promotion, display and the like. (Tr. 174-186).

At the interview Miller held with Moyer, Miller had strong reason to suspect Moyer's business judgment. Moyer explained that he had had to sell out his own store "because of lack of capital and general business conditions." (JA, 196; Pl. Ex. 2, JA, 122). Obviously, when a proprietor has to sell out his business because of a lack of capital — that is, that he has not got the funds to keep it going — the business is not successful. Where that business fails within twenty months of its purchase, the business judgment of its proprietor is suspect.

Miller thought Moyer's decision to purchase that business was a major mistake. He thought Moyer's progress since Lord & Taylor was "down and down" and that his career job choices showed "bad misjudgments." Before operating his own business unsuccessfully, Moyer had moved

from strong, successful stores to "the small store kind of operation" in small towns and with businesses that were "not strong stores, stores of success or importance." Miller was "shocked" to learn from their conversation that when Moyer went to work as an executive and member of the "operating committee" at one store, he did not have correct knowledge of who owned the business. (JA, 109, 136).

The Magistrate understood Elder-Beerman's requirements for someone with considerable discretionary judgment in the financial aspects of supervising a complex and sensitive aspect of its business. He found that defendant's good faith belief plaintiff lacked business acumen was based upon the fact plaintiff's own business had not been successful and the quality of plaintiff's past business judgments. (JA, 72, 75). The Court of Appeals concurred in the finding that the "size and quality of retail establishments" at which Moyer worked over recent years was "an important and justifiable concern." (Appendix to Petition for Writ of Certiorari, 4a).

Petitioner asserts that the "size and quality" of Moyer's recent employers, mentioned by the Sixth Circuit, is nowhere mentioned by the magistrate in his findings of fact. While the magistrate did not use that phrase, as such, it is abundantly clear that he meant the same thing in his references to "Plaintiff's own business" and the "quality of Plaintiff's business judgments while employed with other firms in the past." (JA 72). The business judgments to which Miller referred in testimony had to do with Moyer's career decisions in going to small stores in Oklahoma and Pennsylvania. (JA, 136).

Even this brief evidentiary review demonstrates that the evaluation of Moyer's resume and his interview, which preceded rejecting him, provided defendant with the very reasons it articulated, and the courts below found persua-

sive, for rejecting petitioner. The record therefore does not give rise to a valid question framed to attack post hoc justifications for rejection.

PETITIONER'S CITATION TO AUTHORITY IS MISLEADING BECAUSE THE BURDEN OF PROOF IS NOT AT ISSUE.

Petitioner has claimed the lower courts' decision conflicts with the opinion of this court in *Texas Department of Community Affairs* v. *Burdine,* 450 U.S. —, 101 S.Ct. 1089, 67 L.Ed. 2d 207 (1981). In fact, the *Burdine* holding has no application to his argument.

Burdine held that in a Title VII suit of sex discrimination, the defendant carries no burden of persuasion when he articulates nondiscriminatory reasons for an employment action to rebut plaintiff's prima facie case. *Burdine* confirmed that the ultimate burden of persuasion remains with the plaintiff alleging unlawful discrimination.

Here, defendant carried a burden of persuasion it did not need to carry. It proved, by a preponderance of the evidence, that plaintiff would not have been hired absent consideration of age, (JA, 192-193), and "established that plaintiff was not selected . . . due to legitimate business considerations." (JA, 74).

The ultimate burden which rests with plaintiff is to prove that the employer failed to hire him because of such individual's age. 29 U.S.C. § 621 (a) (1). He failed to carry that burden because the lower courts were persuaded "the decision not to hire Mr. Moyer was made . . . not as a result of discrimination on the basis of age." (JA, 72).

In support of whatever his theory may be, petitioner

asserted "that Miller was in fact relying on age as a serious negative factor in the refusal to hire." The lower courts simply do not concur. The magistrate found nothing more than that Miller considered Moyer's age, and he went on specifically to find that that consideration did not make a difference in defendant's determination not to hire Moyer. (JA, 71).

It thus appears that *Burdine* is not on point. Petitioner's only true argument here is with the findings of fact made below and twice upheld on review, that plaintiff failed to prove the determination not to hire him was because of age. His argument with that finding of fact does not present an appropriate basis for this court of law to issue its writ of certiorari. *Branti* v. *Finkel,* 445 U.S. 507, 512 fn.6 (1980); *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.,* 336 U.S. 271, 275 (1949).

CONCLUSION

Petitioner's question for review does not validly arise upon the record. The findings of fact, that his rejection was due to legitimate business reasons and not to discrimination based on age, have been concurred in by special master, district court and court of appeals. Those findings do not merit review by this Court.

Therefore, Respondent prays this Court to deny Petitioner's Petition for Writ of Certiorari.

Respectfully submitted,

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Counsel for Respondent,
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CERTIFICATE OF SERVICE

Pursuant to the United States Supreme Court Rules, I hereby certify that three copies of this Brief for Respondent in Opposition to Petition for Writ of Certiorari were served this ...8.. day of January, 1982, on Robert G. Breetz and Octavia B. Wilkins, Stites, McElwain & Fowler, 3400 First National Tower, Louisville, Kentucky 40202, Counsel for Petitioner James J. Moyer.

.....

Merle F. Wilberding

Petitioner's Reply Brief

81-1073

No. 81-10732

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CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

JAMES J. MOYER - - - - - Petitioner

versus

ELDER-BEERMAN STORES CORP. - Respondent

REPLY BRIEF FOR PETITIONER IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

No. 81-10732

JAMES J. MOYER - - - - - *Petitioner*

v.

ELDER-BEERMAN STORES CORP. - - *Respondent*

REPLY BRIEF FOR PETITIONER IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

ARGUMENT

I. The Decision of the United States Court of Appeals for the Sixth Circuit Is Inconsistent With the Newly-decided Ninth Circuit Decision in *Nanty* v. *Barrows Co.*, 660 F. 2d 1327 (9th Cir. 1981).

Pursuant to Supreme Court Rule 22.6, petitioner Moyer would call the Court's attention to the very recent decision in *Nanty* v. *Barrows Co.*, 660 F. 2d 1327 (9th Cir. 1981). This case was decided on November 9, 1981, and no version of it was reported at the time of the filing of the petition for certiorari.

Nanty confirms petitioner's argument that an employer may not dispel proven discrimination by articulating reasons for the rejection of an applicant which were not known to the employer at the time of the rejection. Nanty, a native American, applied for a

job as a truck driver at a furniture delivery firm. The employer summarily rejected him, and soon thereafter hired two Caucasian drivers. After finding that Nanty had made out a prima facie case, the Ninth Circuit stated:

> We now turn to step two of the *McDonnell Douglas* analytic process, and consider the question whether Barrows "articulate[d] a legitimate nondiscriminatory" reason for Nanty's rejection. At step two of the *McDonnell Douglas* analysis, the defendant must show, "through the introduction of admissible evidence, the reasons for the plaintiff's rejection." *Burdine,* —— U. S. at ——, 101 S. Ct. at 1094 (emphasis added) (footnote omitted). Barrows makes several arguments explaining why Nanty would not have been hired as a furniture delivery truck driver. However, these arguments are simply not relevant here, since none explains the reason for Nanty's rejection. Barrows knew nothing about Nanty at the time of the rejection and offers no explanation for its action in rejecting Nanty. Thus Barrows has totally failed to "articulate a legitimate nondiscriminatory" reason for Nanty's rejection and to meet its step two burden.

660 F. 2d at 1332. This holding, while at odds with the actual analysis of the Sixth Circuit in the petitioner's decision below, is consistent with the approach taken by other courts to post-hoc justifications by employers. E.g., *King* v. *New Hampshire Dept. of Resources & Economic Development,* 562 F. 2d 80, 83 (1st Cir. 1977) ("[d]efendants cannot rely on information learned

only in July to justify their refusal to hire plaintiff in May. . . ."); *United States* v. *Wattsburg Area School District,* 429 F. Supp. 1370, 1379 (W.D. Pa. 1977) ("[f]urther, the evaluations of her teachings never surfaced as unsatisfactory until this controversy arose, the previous ratings for several years being satisfactory").

Nanty is instructive in another regard. The employer in *Nanty* sought to justify its rejection of him by relying on an unwritten requirement that applicants be neat, articulate, and personable. 660 F. 2d at 1332 n. 5. The Ninth Circuit rejected this argument:

> Use of subjective job criteria not only has, in many instances, a disparate impact on minorities, but also provides a convenient pretext for discriminatory practices. Subjective criteria may easily be asserted as the reason for an adverse employment decision when, in fact, the reason was discriminatory.

660 F. 2d at 1334. Respondent Elder-Beerman's rationalizations that Moyer did not have a "feel" for trends in the fashion market, was not "with it," lacked "imagination [and] intuitiveness" and was not "dynamic"—all conclusions apparently reached in a one hour interview—demonstrate the same flaw that the *Nanty* court condemned. See Respondent's Brief in Opposition at 4, 6.

II. Respondent's Attempt to Characterize the Certiorari Issues as Factual Is Without Merit.

In an intriguing change of strategy, respondent Elder-Beerman now seeks to argue its case in a manner inconsistent with its proof at trial. Apparently conceding the validity of Moyer's legal arguments, Elder-Beerman has chosen to argue the certiorari issue as if the justifications for the rejection decision which Elder-Beerman presented to the trial court were solely factors known to Elder-Beerman's president in August of 1977. Elder-Beerman's own pleadings belie this contention.

As shown in its own post-trial memorandum (JA 38-48), Elder-Beerman sought to impugn Moyer's abilities primarily through the presentation of charges which were unknown to Elder-Beerman's president at the time of his rejection of Moyer's application:

(i) Elder-Beerman contended at trial that Moyer was unfit for employment because *after* his rejection by Elder-Beerman he was unable to secure employment for another year. (JA 39, 91)

(ii) Elder-Beerman argued at trial that Moyer's low salary at the time of trial—almost two years after his rejection—confirmed his lack of ability. (JA 39)

(iii) Elder-Beerman repeatedly asserted to the district court that bankruptcies by previous employers of Moyer demonstrated that Moyer himself had poor business judgment. (JA 47, 91)

(iv) Elder-Beerman contended at trial that Moyer's ignorance of the details of the ownership arrangement of one of his former employers established his lack of business sophistication. (JA 48, 91)

Elder-Beerman does not here contend that any of these supposedly negative factors was known by its president at the time he wrote Moyer in August of 1977. Nowhere in its brief in opposition filed in this court does it even mention any of these post hoc rationalizations which it pressed with such zeal in the lower courts.

In short, the argument of respondent that there was no consideration by the trial court of information not known by Elder-Beerman president Miller at the time of Moyer's rejection is thoroughly discredited by Elder-Beerman's own district court briefs. This information, developed through the discovery process to attempt to shore up Elder-Beerman's defense to its admissions of discrimination, would never be available to employer in the usual course of hiring an executive. No employer subjects job applicants to the deposition and discovery process. Indeed, some of Elder-Beerman's contentions—including Moyer's subsequent difficulty in the job market and his 1979 compensation—were not even in existence at the time of the August 1977 rejection letter, and could have been known by Elder-Beerman's president only through the gift of prophecy.

One final point in respondent's brief needs correction. Elder-Beerman concedes that the factor of the

"size and quality" of Moyer's recent employers—a factor cited by the Sixth Circuit as justifying Moyer's rejection—is not mentioned anywhere in the magistrate's findings of fact. Elder-Beerman's garbled attempt to equate the "size and quality" of those stores with the magistrate's concern over the "quality of [Moyer's] business judgments while employed with other firms" is impossible to follow. The argument deserves a quick burial. And the magistrate's concern over Moyer's "business judgments *while employed*" plainly relates to the after-discovered evidence of those firm's financial difficulties rather than to any career changes Moyer voluntarily made.

CONCLUSION

Elder-Beerman's brief in this Court is curiously silent about the letter of its president, which so plainly stated, "My concerns relate to your age and your time out of business." (Appendix 18a.) No amount of rationalization can dispel this "smoking pistol." To cure an inconsistency between the Sixth Circuit and the Ninth Circuit's *Nanty* case, and to correct a manifest injustice, this Court should grant a writ of certiorari.

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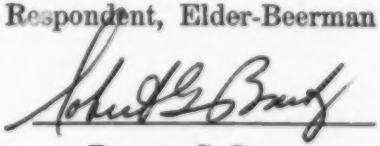
CERTIFICATE OF SERVICE

Pursuant to the United States Supreme Court Rules, I hereby certify that three copies of this Reply Brief for Petitioner were served this 9th day of February, 1982, on Merle F. Wilberding, Esq., Roger J. Makley, Esq. and James R. Levinson, Esq., Coolidge, Wall, Matusoff, Womsley & Lombard Co., L.P.A., Suite 600, IBM Building, Dayton, Ohio 45402, Counsel for Respondent, Elder-Beerman Stores Corp.



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